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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1767

W. T. MAYFIELD SONS TRUCKING CO.,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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No. 75-1747

W. T. MAYFIELD SONS TRUCKING CO.,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

The Government's Brief in Opposition, in its effort to reclassify this as "the most routine of cases," has dramatically underscored the appropriateness of granting certiorari to consider the sole Question Presented in the Petition – whether this case should be remanded to the Fifth Circuit for an explanation of its summary affirmance of the Interstate Commerce Commission order here involved.

The Government advances no tenable theory for the Fifth Circuit's precipitous action. It merely asserts that the court treated the appeal from the Commission's order as "the most routine of cases." But there is no citable evidence that the Fifth Circuit so treated the appeal; the court certainly did not say that the appeal was "routine", much less frivolous. And if it was so routine, why did the Government below urge the Fifth Circuit to set the matter for oral argument? (Pet. 10, n. 8). How can the highly contested culmination of what the Government calls "14 years of administrative and judicial litigation" (Opp. Br. 2) be called a "most routine case"?

Just as it did in its brief before the Fifth Circuit, the Government here first abandons and then restructures the Commission's decision to make it appear to be a common garden variety of an agency's interpretation of one of its own certificates. And from that restructuring, Government counsel now allege that the Fifth Circuit's affirmance of that restructured decision must have been a routine matter.

But, as demonstrated in the Petition, pp. 8, 16, the Commission's decision will not support such after-the-fact restructuring. While the administrative law judge did purport to find the certificate ambiguous on its face, so as to justify resort to the certificate's history for interpretative purposes, the Government in this Court makes the critical error of implying (Opp. Br. 5) that the "Commission agreed with the administrative law judge" that the certificate on its face was "ambiguous."* The Commission simply did not agree as

*The critical sentence in the Brief in Opposition appears at the top of page 5: "The Commission agreed with the administrative law judge - it described the ambiguous certificate

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to that critical legal conclusion. The term "ambiguous" is a word of art in the world of interpreting Commission certificates; that "ambiguous" concept has generated a prolific if not "routine" jurisprudence for interpreting and reinterpreting Commission certificates. Such interpretations are precisely the kind of "routine" administrative acts to which the courts give great deference (Opp. Br. 5). See Pet. 6-8.

The Commission, however, did not here find that petitioner's certificate was "ambiguous" on its face, as the administrative law judge had done. Rather, the Commission found the certificate "unique," and the Commission turned to the certificate's history to interpret a certificate that was merely "unique" or one-of-a-kind without seeming ambiguity. (Pet. App. 7b).

From that novel and unprecedented action of the Commission springs a series of statutory and legal problems, many of them anything but "routine." In no other case has the Commission ever resorted to a certificate's history without first having found it "ambiguous." In no other case has the Commission given any significance to the "uniqueness" of a certificate, particularly as a basis for historical reinterpretation.

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as 'unique' - and likewise resorted for interpretation to the history of the certificate . . ."

This is an artfully drawn sentence. It does not literally say that the law judge found the certificate "unique" or that the Commission agreed with his judgment that it was "ambiguous." But to the quick reader it leaves the impression that the Commission agreed that the ambiguous certificate was unique, or that the Commission described it as both ambiguous and unique.

What, then, is the basis of the Fifth Circuit's affirmance? Did it treat the Commission's decision as a novel and important extension of the "ambiguity" concept? Did it reinterpret the decision, as Government counsel then urged and still urge, into a routine application of the "ambiguity" doctrine? Did the Fifth Circuit mean to say that administrative decisions are to be reviewed on some basis other than what was articulated by the agency?

Significantly, the Government's brief in this Court does not answer any of those questions. Nor does it address itself to the critical and the only problem raised in the Petition. When no answers are given, or can be given, to the foregoing questions, how can this Court or the parties determine whether the enigmatic action of the Fifth Circuit creates any issue worthy of review on certiorari?

In short, the Government's Brief in Opposition is but another *post hoc* rationalization of the Commission's decision. It therefore offers no satisfactory reason why this case should not be remanded to the Fifth Circuit for an explication of the reasons for affirming the Commission's novel but dubious decision.

Respectfully submitted,

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